strictions to be found in the constitution, upon the power of the legislature to fix and declare the rate of compensation to be paid for labor or services performed upon the public work of the state." The court then went on to state that as such legislation was not in conflict with the constitution, the matter is one with which the courts have no concern.

As far as the Fourteenth Amendment is concerned, the right of a State to discriminate between municipal corporations and private idividuals, was settled by the United States Supreme Court in *Hunter v. Pittsburgh,* 207 U. S. 161, and *Atkin v. Kansas, supra.* Previously, the decisions in some states, showed a tendency to extend to municipal corporations, in matters affecting their property and private contract rights, practically the same immunity from legislatative interference as is accorded to business corporations and private citizens. *Weismer v. Village of Douglass,* 64 N. Y. 91; *Board of Park Commissioners v. Common Council of Detroit,* 28 Mich. 228. The court in the last mentioned case laid down the following rule: "The constitutional principle, that no person shall be deprived of property without due process of law, applies as well to municipal corporations in their private capacity as to corporations for manufacturing and commercial purposes."

### THE RIGHT OF PRIVACY.

The recent decisions of the Court of Appeals of New York, in the cases of *Rhodes v. The Sperry & Hutchinson Company,* 40 N. Y., *Law Journal,* No. 28, and *Wyatt v. James McCreery Company,* 111 N. Y. Sup. 86, declaring constitutional the act passed by the legislature on April 6, 1903, authorizing a suit to restrain the use for advertising purposes of a person's picture, and for damages unless the written consent of such person, or if a minor, of his parent, has been previously obtained, *N. Y. Laws,* 1903, Chapt. 132, § 2, are most important, for they now insure the enforcement of the right of privacy by statutory enactment in a jurisdiction wherein the Courts of Equity had previously denied relief.

This doctrine, which is in reality founded on the right of a person "to pass through the world without having his picture published without his consent, or his business interfered with, or his successful experiments and works published, or his eccentricities commented upon in handbills, periodicals, or newspapers," has been traced as far back as 1820, when the Courts of Equity

granted an injunction to restrain the employee of a physician from making use of or communicating certain receipts which he had surreptiously copied, on the ground that it was a breach of trust and confidence. *Yovatt v. Wingard,* 1 J. & W. 394. In like manner, injunctions were granted restraining the recipient of private letters from publishing them on the ground that he only had them for the qualified purpose for which they were sent to him, *Gee v. Pritchard,* 2 Swaust. 402; a pupil from publishing the lectures of a professor, on the ground that it was a breach of confidence on the part of the pupil, who was admitted to hear them only for his own information, and not for sale and profit by him; *Abernathy v. Hutchinson,* 3 L. J. Chancery 209 (1825); a person from exhibiting and publishing a descriptive catalogue of private etchings which the Queen and Prince were having printed for themselves, on the ground that it was a breach of trust and confidence, and a violation of their property right, *Prince Albert v Strange,* 2 De G. & S. 652 (1849); and a photographer from making, exhibiting and selling copies of a photograph of a woman who had had her picture taken by him, on the ground of implied contract not to use the negative for any purpose other than to supply the applicant with a number of copies of it for a specified sum. *Pollard v. Photo Co.,* L. R. 40, Chanc. Div. 345 (1888).

Thus, in all cases up to 1890, the courts based their decisions either on the recognition of the violation of the right of property, or on the ground that the publication would be a breach of contract, confidence or trust, rather than recognize the Right of Privacy. It was during that year, however, that this doctrine first gained definite expression in an article in *Scribner's Magazine,* for July, entitled, "The Rights of the Citizen to his Reputation," by E. L. Godkin, Esq., and in a most enthusiastic treatise on the "Right of Privacy," in 4 *Harvard Law Review,* 193, which said: "Notwithstanding the unanimity of the courts in resting their decisions upon property rights in cases where the publication is prevented by injunction, in reality, such prevention was due to the necessity of affording protection to thoughts and sentiments expressed through the medium of writing, printing, and the arts, . . . . in other words, that the principle actually involved though not always appreciated, was that of inviolate personality and not that of private property." This article was soon answered by the *Northwestern Review,* Vol. III, p. 1, which stated that "Equity had no concern with the feelings of an individual, or with

the consideration of moral fitness, except as the inconvenience or discomfort which the person may suffer, is connected with the possession or enjoyment of property."

The courts then began to take cognizance of this right in deciding their cases, and in the same year, by injunction, restrained the sale of photographs of an actress taken by flashlight and without her consent, while she was playing her rôle in a theatre. *Memola v. Stevens* N. Y. (not reported.) Two years later, in the case of *Scheyler v. Curtiss,* 64 Hun. N. Y. 594, the near relatives of Mrs. Scheyler sought an injunction to restrain the erection of a life-sized statue to her memory, which was to be designated as the "Typical Philanthropist" at the Columbian Exposition. The Court granted it on the ground that the wishes of her near relatives must control—that a stranger had no right to invade the right of privacy, which attaches to a person when living and to her memory when dead. This case was appealed and in 147 N. Y. 434, (1905) the court, in reversing the decision, only recognized the right of privacy in the dictum, when it said that "even though the right did exist, it did not survive the death of the person to the perpetuation of whose memory it was sought to erect a statue." About the same time another interesting case arose, in which an action was brought to restrain the publication of a biography and picture of one Mr. Corliss, on the ground that it was a violation of the Right of Privacy. The lower court granted the injunction, but on appeal, it appeared that Mr. Corliss was a public character, and the judgment was reversed. The court holding that a private individual, because of his personal and property rights, could be protected from the publication of his portrait in any form, but as he became known before the public he waived that right, and consequently could not restrain the publicity of his portrait. *Corliss v. Walker,* 57 Fed. Rep. 434. 64 Fed. Rep. 280. Another phase of this question is well illustrated in the case of *Atkinson v. Doherty,* 121 Mich. 372 (1899), where the widow of a well-known lawyer sought to enjoin a cigar manufacturer from using his name and portrait upon the boxes of cigars which he manufactured. The court dismissed the suit on the ground that all authoritative cases similar to this were based on property or contractual rights, and as her husband would have been unable to secure relief had he himself been alive, so were his survivors.

The direct question, however, as to the existence or non-

existence of the Right of Privacy which was enforceable in the Courts of Equity, did not arise until 1901, when the case of *Robertson v. Rochester Folding Box Co.,* 171 N. Y. 538, was presented to the New York Courts. In that case an action was brought by a young woman to restrain a Flour Milling Company from using her likeness with the words "Flour of the Family" written above it, without her consent, for the purpose of advertising its goods, on the ground that it was an invasion of the Right of Privacy and that it caused her great mental and physical distress, necessitating the employment and attendance of a physician. The court, after much difficulty, decided against its existence by the vote of four to three. Judge Parker in his decision, declared that because of the then existing condition of the law, the Right of Privacy could not be enforced in the Court of Equity to restrain such an action, but he expressly said: "The legislative body could very well interfere and arbitrarily provide that no one should be permitted, for his own selfish purpose, to use the picture or the name of another for advertising purposes without his consent." Judge Gray dissented very strongly to this decision and urged that as the protective power of equity is not exercised upon tangible things, but upon the right to enjoy them—it should be called for the protection of the right which is in one's exclusive possession as a property right, in this case, viz: the right of an individual to the peculiar cast of his own features.

The legislature, acting in accordance with the recommendation of the court, passed the suggested statute, (N. Y. Laws, 1903, Chapt. 132, § 2) within a short time and it was on the question of the constitutionality of this statute that the case of *Wyatt v. James McCreery Co.,* and *Rhodes v. The Sperry & Hutchinson Company* were appealed. In the former case, when an action was brought to restrain a photographer from using, for advertising purposes, the picture of an infant which he had photographed at a reduced rate with the oral understanding that she was to relenquish to the photographer all rights of reproducing and disposing of the pictures, on the ground that the written consent of her parent or guardian had not been obtained, the court held that this was in violation of the statute requiring the written consent of the parent or guardian of the minor before her picture could be used for advertising purposes, and as the act was constitutional in that respect, the photographer could be restrained. 111 N. Y. Sup. 86. In the latter case, an action was brought in the lower

court by a young woman to restrain a Trading Stamp Company from exhibiting her picture, without her consent, written or otherwise, among their premium exhibits which were exchanged for trading stamps, on the ground that it was in violation of the statute requiring her consent to be given in writing before her pictures could be used for advertising purposes. The lower court granted the injunction and $1,000 damages. On appeal from this decision on the ground of the unconstitutionality of the statute, both the Brooklyn Appellate Division, 120 N. Y. App. Div. 467, and the Court of Appeals, on October twenty-third last, upheld it as constitutional. The Court of Appeals in discussing its operation, held that it was entirely prospective in its nature and hence did not apply to pictures—acquired prior to the enactment of this statute.

Directly opposed to this New York doctrine are cases which have been decided by the Courts of Georgia and New Jersey, expressly recognizing the doctrine as being enforceable without the assistance of legislative enactment. In the first of the cases, *Pavesich v. The New England Life Insurance Company,* 122 Geo. 190, (1904), the court held that the publication of an advertisement by an insurance company containing a persons picture and statements that he had policies of insurance with the company and was pleased with the investment, when in fact he had no such policies, and had never given consent to the publication of his picture, was a trespass on the person's Right of Privacy and could be restrained. The court traced the doctrine from the very instincts of nature and said the Roman Law recognized it. They especially commended the dissenting opinion of Judge Gray, in the *Robertson v. Rochester Folding Box Co.* Case, 171 N. Y. 538 This decision has been recently followed in the case of *Edison v. Edison Polyform Co.,* 67 Atl. Rep. 392, N. J. (1907) in which the Court of Equity granted an injunction to restrain the unauthorized use of Mr. Edison's name, picture, and pretended certificates by a manufacturing company in which Mr. Edison was not interested on the ground that it was a violation of the Right of Privacy. The court, in discussing the case, distinctly repudiates the New York doctrine, and says: "If it is recognized that a man's name is his own property, it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized

use of it," and concludes by saying "it would be difficult to imagine a case in which the preventative relief would be more appropriate than the present."

On the kindred question of the right of the police department to take the photograph and Bertillion measurements of a person arrested on the suspicion of having committed a crime, and place them in the Rogue's Gallery previous to the trial of the accused, the New York Courts have assumed an attitude similar to that taken in the case of *Robertson v. Rochester Folding Box Co.*, 171 N. Y. 538, and have held that a mandatory injunction, to surrender the negative and destroy the measurements, when the accused was acquitted of the charge, on the ground that his Right of Privacy had been invaded, would not lie. *Owens v. Partridge*, 82 N. Y. Sup. 248 (1903). The Louisiana Courts, however, have followed the broader doctrine, similar to that of Georgia and New Jersey, and have declared in the cases of *Schulman v. Whitaker*, 117 La. 704 (1906), and *Itzkovitch v. Whitaker*, 117 La. 708 (1906), wherein persons who had been arrested on the suspicion of having received stolen property, had had their photographs and Bertillion measurements taken previous to the trial, were subsequently acquitted of the charge, that the police department did not have the right to subject the accused to such embarrassments until after they were convicted unless it was absolutely necessary for identification of a convict, hardened criminal, or fugitive from justice. Their decisions were based on the grounds that the personal Right of Privacy of the accused had been violated and that such actions should be restrained until after conviction, for, otherwise, persons would often be permanently stamped as dishonest, whereas, in fact, they were entirely innocent of the crime of which they were charged.

The Louisiana doctrine may, in this respect, appeal to our sense of justice, but in comparing the New York doctrine with that of Georgia, New Jersey and Louisiana in other respects, it seems that the New York doctrine is more sound, for by the legislative enactment the same result is accomplished, and it confines the doors of equitable jurisprudence to reasonable bounds, and does not open them to the vast amount of litigation which often would border on the absurd because of the impossibility to restrain and confine them to their proper limits.

### POLICE POWER OF MUNICIPAL AUTHORITIES.

The Supreme Court of Illinois has again been called upon to